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No. 82-374

IN THE

Supreme Court of the United States

October Term, 1982

ROBERT FLANAGAN, et al.,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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INDEX

	Page
Chronological List of Relevant Docket Entries	A1
Indictment, Dated September 10, 1981	A4
Defendants Keweshan, Landis, and McNamee's Motion for Severance From Co-Defendant Flanagan (Pages 1-4) ..	A15
Memorandum of Law in Support of Defendants' Motion for Severance of Defendants and Offenses Pursuant to Fed. R. Crim. P., Rule 14 (Pages 1-2)	A19

The following Opinions, Orders, and Transcript of Proceedings have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the printed Petition for Certiorari:

Panel Opinion of the United States Court of Appeals for the Third Circuit entered June 2, 1982 ..... A2

Opinion of the United States District Court for the Eastern District of Pennsylvania dated December 2, 1981 ..... A12

Order of the United States District Court for the Eastern District of Pennsylvania dated December 2, 1981 .. A29

Order of the United States District Court for the Eastern District of Pennsylvania dated December 4, 1981 .. A30

Judgment Order of the United States Court of Appeals for the Third Circuit entered June 2, 1982 ..... A32

Order Denying Rehearing of the United States Court of Appeals for the Third Circuit entered July 12, 1982 A34

Transcript of Rule 44(c) Proceedings held before the United States District Court for the Eastern District of Pennsylvania on November 12, 1981 ..... A36

Discussion A36

Robert Flanagan A46

James Keweshan A51

Sidney Landis A56

Thomas McNamee A61

Discussion A66

All references in Petitioner's Brief to the above items reprinted in the Appendix to the Petition for Certiorari will be noted as "PA —."

IN THE

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No. 82-374

ROBERT FLANAGAN, ET AL.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JOINT APPENDIX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Sept. 10, 1981—True Bill.

Sept. 13, 1981—Defendants' Motion for Severance of the Conspiracy Count From the Substantive Count, Memorandum of Law in Support, Certificate of Service filed.

Oct. 20, 1981—Motion of Government for a Hearing and to Prohibit Multiple Representation and Memo filed.

Oct. 20, 1981—Government's Response to Motion of Defendant Keweshan, et al. for Severance from Defendant Flanagan, and Motion of all Defendants for Severance of Counts and Memo filed.

Oct. 29, 1981—Defendants' Answer to Government's Motion for a Hearing and to Prohibit Multiple Representation, New Matter and Memo filed.

Nov. 12, 1981—Argued sur: Government's Motion for Hearing and to Prohibit Multiple Representations-Defendants and Government Directed to Brief Issue of Whether Court Should Order Separate Representation filed.

Nov. 19, 1981—Defendants' Memorandum of Law on Issues Related to the Appointment of Individual Counsel by the Court filed.

Nov. 19, 1981—Government's Supplemental Memorandum in Support of its Motion for Disqualification of Counsel filed.

Nov. 23, 1981—Defendants' Reply on Issues Related to Appointment of Individual Counsel filed.

Dec. 2, 1981—Transcript of 11/12/81 filed.

Dec. 2, 1981—Opinion, Luongo, J. Sur Government's Motion to Prohibit the Law Firm of Sprague & Rubenstone From Representing All Four Defendants filed.

Dec. 2, 1981—Order Granting Motion of Government to Prohibit Multiple Representation of Defendants and Firm of Sprague & Rubenstone is Disqualified From Representing any of Defendants; That Each Defendant Shall Within 20 Days Cause Substitute Counsel of His Choice; That a Stay is Granted Pending Disposition of Appeal filed.

Dec. 3, 1981—Motion of Defendants for Reconsideration and/or Clarification and Memo filed.

Dec. 4, 1981—Order Granting Defendants' Motion for Clarification of Court's Opinion and Order Filed December 2, 1981 filed.

Dec. 8, 1981—Defendants' Notice of Appeal filed.

Dec. 8, 1981—Copy of Clerk's Notice to U.S. Court of Appeals filed.

Apr. 6, 1982—Motion by Amicus Curiae, Nat'l Assoc. of Crim. Defense Lawyers, Inc., et al. for Leave to File Brief Amicus Curiae, w/serv. filed.

Apr. 13, 1982—Submitted on above Mot. Coram: Gibbons & Hunter, C.J. & Thompson, D.J.

May 4, 1982—Order (Gibbons & Hunter, C.J. & Thompson, D.J.) Granting above Mot. filed.

May 11, 1982—Argument Before Gibbons & Hunter, C.J. & Thompson, D.J., Sitting by Designation.

June 2, 1982—Opinion and Judgment of Court of Appeals for Third Circuit, Affirming Judgment of District Court, Gibbons, J., filed.

June 15, 1982—Petition by Appellants for Rehearing, in banc, filed.

July 12, 1982—Order Denying Petition for Rehearing in banc, Gibbons, J., filed.

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 81-00270

UNITED STATES OF AMERICA

v.

ROBERT FLANAGAN
JAMES KEWESHAN
SIDNEY LANDIS
THOMAS McNAMEE

INDICTMENT

DATE FILED: 9/10/81

VIOLATIONS: 18 U.S.C. § 241 (Conspiracy Against Rights of Citizens—One Count)
18 U.S.C. § 242 (Deprivation of Rights Under Color of Law—Twelve Counts)

COUNT ONE

THE GRAND JURY CHARGES:

1. That from in or about September, 1979, to in or about February, 1981, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS McNAMEE, police officers of the City of Philadelphia, did knowingly, wilfully and intentionally conspire, combine, confederate and

agree together, and with others known to the grand jury, to injure, oppress, threaten and intimidate citizens of the United States in the free exercise and enjoyment of the rights secured to them by the Constitution and laws of the United States, to wit: not to be deprived of liberty without due process of law.

2. It was a part of the plan and purpose of the conspiracy that the defendants would, and did, under color of law, arrest various citizens without probable cause.

3. It was further a part of the plan and purpose of the conspiracy that the defendants would, and did, threaten, harrass, intimidate and assault these citizens after they were placed under arrest.

4. It was further a part of the plan and purpose of the conspiracy that the defendants would, and did, falsely accuse various citizens of criminal offenses under the Crimes Code of the Commonwealth of Pennsylvania, which offenses included, but were not limited to, robbery, theft, receiving stolen property and assault.

5. It was further a part of the plan and purpose of the conspiracy that the defendants would, and did, give false testimony during court proceedings in the courts of the Commonwealth of Pennsylvania in order to cause these citizens to be found guilty of crimes which they had not committed.

6. It was further a part of the plan and purpose of the conspiracy that the defendants would, and did, misrepresent and conceal the purposes, and acts done in furtherance, of the conspiracy.

Overt Acts

In furtherance of the conspiracy, the following overt acts, among others, were performed within the Eastern District of Pennsylvania:

1. On or about September 28, 1979, ROBERT FLANAGAN, JAMES KEWESHAN and THOMAS MCNAMEE did arrest and cause the arrests of Leslie Walker and Wayne Howard.

2. On or about September 26, 1979, ROBERT FLANAGAN did give an oral statement to Detective Joseph Falcone of the Philadelphia Police Department concerning the arrest of Leslie Walker and Wayne Howard.

3. On or about September 26, 1979, THOMAS MCNAMEE did give an oral statement to Detective Joseph Falcone of the Philadelphia Police Department concerning the arrest of Leslie Walker and Wayne Howard.

4. On or about October 31, 1979, ROBERT FLANAGAN testified at the preliminary hearing of Leslie Walker and Wayne Howard.

5. On or about November 10, 1979, ROBERT FLANAGAN testified in the prosecution of Leslie Walker and Wayne Howard.

6. On or about November 14, 1979, THOMAS MCNAMEE testified in the prosecution of Leslie Walker and Wayne Howard.

7. On or about December 18, 1979, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS MCNAMEE did arrest and cause the arrests of Tracy Woodrit and Vance Young.

8. On or about December 18, 1979, ROBERT FLANAGAN did give an oral statement to Detective Anthony Scalzo of the Philadelphia Police Department concerning the arrests of Tracy Woodrit and Vance Young.

9. On or about December 18, 1979, SIDNEY LANDIS did order a Philadelphia Police dog to attack Tracy Woodrit.

10. On or about December 18, 1979, JAMES KEWESHAN, THOMAS MCNAMEE and SIDNEY LANDIS did intimidate, threaten, assault, beat and physically abuse Vance Young.

11. On or about December 18, 1979, SIDNEY LANDIS gave an oral statement to Detective Anthony Scalzo concerning the arrests of Tracy Woodrit and Vance Young.

12. On or about May 19, 1980, ROBERT FLANAGAN, SIDNEY LANDIS, and THOMAS MCNAMEE did arrest and cause the arrest of Ronald Ford.

13. On or about May 19, 1980, ROBERT FLANAGAN, SIDNEY LANDIS and THOMAS MCNAMEE did arrest and cause the arrest of Ronald Tooles.

14. On or about May 19, 1980, ROBERT FLANAGAN did give an oral statement to Detective Martin Connors concerning the arrest of Ronald Ford.

15. On or about May 19, 1980, ROBERT FLANAGAN did give an oral statement to Detective Martin Connors concerning the arrest of Ronald Tooles.

16. On or about May 19, 1980, SIDNEY LANDIS did cause a Philadelphia Police dog to attack Ronald Tooles.

17. On or about June 9, 1980, ROBERT FLANAGAN did testify at the preliminary hearing of Ronald Ford and Ronald Tooles.

18. On or about June 9, 1980, THOMAS MCNAMEE did testify at the preliminary hearing of Ronald Ford and Ronald Tooles.

19. On or about June 9, 1980, SIDNEY LANDIS did testify at the preliminary hearing of Ronald Ford and Ronald Tooles.

20. On or about November 3, 1980, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS MCNAMEE did arrest and cause the arrest of Arthur Adams.

21. On or about November 3, 1980, ROBERT FLANAGAN did give an oral statement to Detective Robert Sobolusky of the Philadelphia Police Department concerning the arrest of Arthur Adams.

22. On or about November 3, 1980, THOMAS MCNAMEE did give an oral statement to Detective Robert Sobolusky of the Philadelphia Police Department concerning the arrest of Arthur Adams.

23. On or about November 3, 1980, SIDNEY LANDIS did give an oral statement to Detective Robert Sobolusky of the Philadelphia Police Department concerning the arrest of Arthur Adams.

24. On or about November 3, 1980, JAMES KEWESHAN did give an oral statement to Detective Robert Sobolusky of the Philadelphia Police Department concerning the arrest of Arthur Adams.

25. On or about January 6, 1981, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS and THOMAS MCNAMEE did arrest and cause the arrest of Douglas Bibbs.

26. On or about January 6, 1981, JAMES KEWESHAN and THOMAS MCNAMEE did intimidate, assault and physically abuse the person of Douglas Bibbs.

27. On or about January 6, 1981, ROBERT FLANAGAN did give an oral statement to Detective Anthony Scalzo of the Philadelphia Police Department concerning the arrest of Douglas Bibbs.

28. On or about January 6, 1981, JAMES KEWESHAN did give an oral statement to Detective Anthony Scalzo of the Philadelphia Police Department concerning the arrest of Douglas Bibbs.

29. On or about January 6, 1981, SIDNEY LANDIS did give an oral statement to Detective Anthony Scalzo of the Philadelphia Police Department concerning the arrest of Douglas Bibbs.

30. On or about January 6, 1981, THOMAS MCNAMEE did give an oral statement to Detective Anthony Scalzo of the Philadelphia Police Department concerning the arrest of Douglas Bibbs.

All in violation of Title 18, United States Code, Section 241.

COUNT TWO

THE GRAND JURY FURTHER CHARGES:

That on or about September 27, 1979, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully arrest Leslie Walker, an inhabitant of the Commonwealth of Pennsylvania, without probable cause, and thereby did wilfully deprive Leslie Walker of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT THREE

THE GRAND JURY FURTHER CHARGES:

That on or about September 27, 1979, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully arrest Wayne Howard, an inhabitant of the Commonwealth of Pennsylvania, without probable

cause, and thereby did wilfully deprive Wayne Howard of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT FOUR

THE GRAND JURY FURTHER CHARGES:

That on or about December 18, 1979, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully arrest Tracey Woodrit, an inhabitant of the Commonwealth of Pennsylvania, without probable cause, and thereby did wilfully deprive Tracey Woodrit of her right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT FIVE

THE GRAND JURY FURTHER CHARGES:

That on or about December 18, 1979, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully arrest Vance Young, an inhabitant of the Commonwealth of Pennsylvania, without probable cause, and thereby did wilfully deprive Vance Young of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT SIX

THE GRAND JURY FURTHER CHARGES:

That on or about December 18, 1979, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully intimidate, assault and physically abuse the person of Tracey Woodrit, an inhabitant of the Commonwealth of Pennsylvania, without just cause, and thereby did wilfully deprive Tracey Woodrit of her right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT SEVEN

THE GRAND JURY FURTHER CHARGES:

That on or about December 18, 1979, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully intimidate, threaten, assault, beat and physically abuse the person of Vance Young, an inhabitant of the Commonwealth of Pennsylvania, without just cause, and thereby did wilfully deprive Vance Young of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT EIGHT

THE GRAND JURY FURTHER CHARGES:

That on or about May 19, 1980, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN,

SIDNEY LANDIS, and ROBERT MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully arrest Ronald Ford, an inhabitant of the Commonwealth of Pennsylvania, without probable cause, and thereby did wilfully deprive Ronald Ford of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT NINE

THE GRAND JURY FURTHER CHARGES:

That on or about May 19, 1980, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, SIDNEY LANDIS, and ROBERT MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully arrest Ronald Tooles, an inhabitant of the State of New Jersey, without probable cause, and thereby did wilfully deprive Ronald Tooles of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT TEN

THE GRAND JURY FURTHER CHARGES:

That on or about May 19, 1980, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, SIDNEY LANDIS, and ROBERT MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully intimidate, assault and physically abuse the person of Ronald Tooles, an inhabitant of the State of New Jersey, without just cause, and thereby did wilfully deprive Ronald Tooles of his right, secured and

protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT ELEVEN

THE GRAND JURY FURTHER CHARGES:

That on or about November 3, 1980, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully arrest Arthur Adams, an inhabitant of the Commonwealth of Pennsylvania, without probable cause, and thereby did wilfully deprive Arthur Adams of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT TWELVE

THE GRAND JURY FURTHER CHARGES:

That on or about January 6, 1981, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS, and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully arrest Douglas Bibbs, an inhabitant of the Commonwealth of Pennsylvania, without probable cause, and thereby did wilfully deprive Douglas Bibbs of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

COUNT THIRTEEN

THE GRAND JURY FURTHER CHARGES:

That on or about January 6, 1981, at Philadelphia, in the Eastern District of Pennsylvania, ROBERT FLANAGAN, JAMES KEWESHAN, SIDNEY LANDIS and THOMAS MCNAMEE, while acting under color of law as police officers for the City of Philadelphia, did wilfully intimidate, assault and physically abuse the person of Douglas Bibbs, an inhabitant of the Commonwealth of Pennsylvania, without just cause, and thereby did wilfully deprive Douglas Bibbs of his right, secured and protected by the Constitution and laws of the United States, not to be deprived of liberty without due process of law.

In violation of Title 18, United States Code, Sections 242 and 2.

A TRUE BILL:

_____

FOREMAN

_____

PETER F. VAIRA
United States Attorney

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 81-00270

UNITED STATES OF AMERICA

v.

ROBERT FLANAGAN;
JAMES KEWESHAN;
SIDNEY LANDIS; and
THOMAS McNAMEE

DEFENDANTS KEWESHAN, LANDIS AND McNAMEE'S MOTION FOR SEVERANCE FROM CO-DEFENDANT FLANAGAN AND THE ABOVE-NAMED DEFENDANTS JOINED BY CO-DEFENDANT FLANAGAN'S MOTION FOR SEVERANCE OF THE CONSPIRACY COUNT FROM THE SUBSTANTIVE COUNT

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DEFENDANTS KEWESHAN, LANDIS AND McNAMEE'S MOTION FOR SEVERANCE FROM CO-DEFENDANT FLANAGAN AND THE ABOVE-NAMED DEFENDANTS JOINED BY CO-DEFENDANT FLANAGAN'S MOTION FOR SEVERANCE OF THE CONSPIRACY COUNT FROM THE SUBSTANTIVE COUNT

COMES Now, Defendants James Keweshan, Sidney Landis, and Thomas McNamee, by and through their Attorneys, Richard A. Sprague, Bruce L. Thall and James Patrick Leonard, and respectfully move, pursuant to Rule 14 of the Fed. R. Crim. P., that this Honorable Court enter an Order severing this trial from that of Co-Defendant Robert Flanagan and, further, the above-named Defendants, joined herein by co-Defendant Robert Flanagan, respectfully move for the entry of an Order by this Honorable Court severing the trial on the alleged violation of 18 U. S. C. § 241 from that on the alleged violation of 18 U. S. C. § 242 and 2. In support of their motions, the Defendants aver as follows:

A. Severance of James Keweshan, Sidney Landis and Thomas McNamee for the Trial of Co-Defendant Robert Flanagan.

(1) Defendants Keweshan, Landis and McNamee are employed as Police Officers and their duty, during the period of time with which this indictment is concerned, was to serve as backup members of co-Defendant Flanagan's Grand-Pop Decoy Team.

(2) Defendants Keweshan, Landis and McNamee, in the performance of this duty would remain hidden while co-Defendant Robert Flanagan, posing as an aged derelict, was confronted and robbed of his money by nu-

merous individuals. Only after the criminals had taken his money and co-Defendant Robert Flanagan gave a standard alarm, "Give me back my money," did the backup officer come on the scene.

(3) Defendants Keweshan, Landis, and McNamee aver that the present Indictment, stripped to the core, discloses that all alleged violations of 18 U. S. C. 241, 242 and 2 are by necessity based upon one of several arrests in which certain of them, in the performance of their duty, and only in response to their team leaders signal, acted to take a suspect into custody, reported their knowledge of this act to their superiors, and, in response to Subpoenas, gave testimony as to their participation in these arrests in various courts of law.

(4) Defendants Keweshan, Landis, and McNamee aver that (a) since their participation in each arrest underlying this Indictment was predicated on their receipt of a prearranged signal from co-Defendant Flanagan; (b) further, that from their places of hiding, they were not privileged to the details of what, in fact, occurred between co-Defendant Flanagan and the various persons who robbed him; and (c) each of the overt acts and acts included in substantive counts, related to certain of them in their individual capacity, is, standing alone, a legal act, and, in fact, was required either by circumstance or law.

(5) Defendants Keweshan, Landis and McNamee aver that in consideration of all the foregoing reasons, the Government's case, by necessity, will be dependent on facts and circumstances of which they have little or no knowledge, but, rather, the vast majority of the Government's evidence will be related to what transpired between co-Defendant Flanagan and the various individuals who robbed him.

(6) Defendants Keweshan, Landis and McNamee aver that under the facts as set forth in (1) through (5) above, it would be error for this Honorable Court to force them to participate in a joint trial with co-Defendant Flanagan, where, by necessity, they will suffer severe prejudice from evidence, if any, offered against Officer Flanagan.

WHEREFORE, Defendants Keweshan, Landis and McNamee respectfully move this Honorable Court to Order a separate trial for them under Criminal No. 81-00270.

B. Severance of Conspiracy Count

(1) Defendants Keweshan, Landis and McNamee, joined herein by Defendant Robert Flanagan, aver that the conspiracy to violate 18 U. S. C. 241 alleged at Criminal No. 81-00270 as having begun on or about September, 1979, and continued to on or about February, 1981, is far broader in

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Criminal No. 81-00270

UNITED STATES OF AMERICA

v.

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JAMES KEWESHAN;
SIDNEY LANDIS; and
THOMAS McNAMEE

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SEVERANCE OF DEFENDANTS AND OFFENSES PURSUANT TO FED. R. CRIM. P., RULE 14

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION FOR SEVERANCE OF DEFENDANTS AND OFFENSES PURSUANT TO FED. R. CRIM. P., RULE 14

A. Severance of the Trial of Robert Flanagan From the Trial of Keweshan, Landis and McNamee

This Motion is predicated on Fed. R. Crim. P., Rule 14. Rule 14 of the Fed. R. Crim. P. states, in relevant part:

> 'If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever relief justice requires . . ."

As is stated in 8 Moore's Federal Practice, ¶ 14.04[4] (Cipes Ed. 1981), wherein Rule 14 was discussed, "Severance may be required to protect a defendant from a "spill-over" of evidence where there is a gross disparity in the quantum of evidence as between the two defendants." See *United States v. Grambrill*, 449 F. 2d 1148 (D. C. Cir. 1971).

In *United States v. Kelly*, 349 F. 2d 720 (2d Cir. 1965), *cert. denied*, 384 U. S. 947 (1966), the Second Circuit reversed the judgment of conviction against one co-Defendant, stating that the safeguard of severance should have been used to protect the co-Defendant "the moment it appeared that he was likely to be prejudiced by the accumulation of evidence of wrongdoing by his co-Defendants." 349 F. 2d at 756. The circumstances underlying the present Indictment are such that Defendants Keweshan, Landis and McNamee strongly urge upon this Court

that "the moment" when prejudice is likely to occur if they are forced to trial along with co-Defendant Flanagan is now. Therefore, on the basis of the facts averred in the attached Motion, which clearly indicate that the Government's case will be one in which there is a "gross disparity in the quantum of evidence" as between themselves and co-Defendant Robert Flanagan, and any negative inference that the jury may draw therefrom will be prejudicially spilled over onto them, a severance must be granted.

The basis of this Motion is the knowledge on the part of Keweshan, Landis and McNamee that by necessity, the Government's case must focus on Robert Flanagan, rather than any belief that co-Defendant Flanagan was involved in any wrongdoing or that the Government will produce evidence of wrongdoing against him.